The Canada Transportation Act Review 2014

Recommendations from the CTA Review Coalition

Members of the Coalition

Canadian Oilseed Processors Association
Manitoba Pulse Growers Association
Western Grain Elevators Association
Canadian Special Crops Association
Keystone Agricultural Producers
Inland Terminal Association of Canada
Animal Nutrition Association of Canada
Pulse Canada
Agricultural Producers Association of Saskatchewan
Canadian Federation of Agriculture
British Columbia Agriculture Council
Alberta Federation of Agriculture

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Executive Summary

The Agriculture Industry CTA review coalition is grateful for this opportunity to contribute to the Canada Transportation Act review process. The coalition represents a wide variety of agriculture industry stakeholders including shippers, processors and producers. Improving Canada's transportation system will be critical to the future growth and prosperity of the Agriculture industry and recent years have demonstrated that change is urgently required. Agriculture industry stakeholders have become increasingly frustrated by the evolution of the Canadian railway system in recent decades which has seen railway efficiency as measured by rail operating ratios and income steadily improve while service has not been adequate to meet shippers' needs in an increasingly competitive global marketplace.

This proposal was developed through extensive consultation with coalition members and with the support of two of Canada's most experienced legal experts in rail regulation and operations. [1]

Problems with the Canadian rail freight system

The coalition believes that there are three fundamental problems with the Canadian railway industry. They are: a lack of railway capacity due to underinvestment, poor performance due to a lack of competitive pressure, and inadequate shipper protection measures in the Canada Transportation Act.

From the beginning of 2000 to the end of 2012, railway workload increased by 34% but over that same period railway net capital investment was negative for 10 of the 13 years of that period. However railway operating income measured in constant 2007 dollars increased by 46% to $4.25 billion in those years and it grew an additional 13% in 2013 to $4.8 billion. [2]

Over that same period, as was demonstrated through the quantitative analysis and stakeholder submissions to the Rail Freight Service Review in 2008-2010, inadequate rail service did not meet shippers' needs to grow and remain competitive. Recently, the performance measurement initiative of the Ag Transport Coalition has been established to clearly measure railway performance and their findings confirm that railway service remains below levels required to support a growing Canadian economy.[3] A recent survey of North American rail shippers conducted for RBC Capital Markets found that 66% of CN shippers and 79% of CP shippers rated the railways service offering as "Poor" or "Fair".[4]

Canada's railways have significant market power over their customers and this economic dominance is particularly strong in the Agriculture sector where shippers have very limited options to transport their products other than by rail. National Transportation Policy as expressed in Section 5 of the Canada

[1] The brief biographies of Mr. Forrest Hume and Mr. Ian MacKay are attached as an appendix to this paper.
[2] See Section 2.1, "Railway capacity".
[3] See Section 2.2, "Railway performance".
[4] RBC Capital Markets North American Railroad Shipper Survey, December 2014.

Transportation Act recognizes that regulation and strategic public intervention must be used when satisfactory outcomes cannot be achieved by market forces alone. However, the shipper protection measures in the Act do not work effectively to rebalance the commercial relationship between shippers and railways in order to achieve outcomes that allow shippers to meet their commercial need for efficient rail service.

The current regulatory regime is one where there is an imbalance of access to information between the railways and both the regulators (the Canadian Transportation Agency and Transport Canada) and shippers. This imbalance of information hobbles the regulators in their role and shippers in their commercial relationships with railways.

In addition, the Act severely limits the Agency's ability to investigate and address systemic problems in the rail system. Shippers who decide to use the regulatory remedies in the Act face long and expensive processes that sometimes fail to resolve the underlying problems. Most importantly, it is the shipper, subject to the dominant market power of railways, who must initiate any Agency investigation or arbitration and this fact leaves them vulnerable to a very real threat of retaliation from their railway supplier.

As the root cause of the problems in the railway system is an imbalance of market power between shippers and railways, the solutions proposed by the coalition are designed to off-set railway power to ensure that railways respond to shippers needs in ways that simulate the operation of a market driven system.

Recommendations

The coalition's advisors considered over 30 distinct proposals for change and developed 10 specific recommendations in five areas.

1. Powers and effectiveness of the Agency

    - Restore the Agency's power to act on its own motion and to issue temporary ex parte orders.
    - Improve the Agency's sources of information about the rail freight system through:
        - enhanced railway reporting to the Agency on commercial and operational activities and enhanced Agency reporting to stakeholders on railway revenues and costs.
        - development of a process of independent, detailed and timely monitoring of railway performance overseen by an advisory body made up of rail system users.
        - provision of the authority and resources for the Agency to engage on an on-going basis with stakeholders.

    These recommendations will increase the effectiveness of the regulator by providing a stronger regulatory backstop for shippers and a deterrent for railways to abuse their market power. By doing so it will support shippers in their day to day commercial and operational relationships with railways.

2. Railway service obligations

- Align level of service provisions of the Act with National Transportation Policy to stress that the needs of the users of the system are paramount.
- Provide for financial consequences for non-performance in service level agreements and in Agency decisions on service level complaints.

These changes will ensure that day to day commercial negotiations between railways and shippers are based upon the requirement that railways provide service that meets the needs of the users of the system and promotes competitiveness and economic growth – as outlined in National Transportation Policy. These changes will also ensure that there are real consequences for railways if they fail to meet standards set out in service level agreements or Agency decisions made pursuant to an investigation into railway service.

3. Shipper protection measures

- Make the use of threats and intimidation by railway employees punishable by fines.
- Amend Section 120.1 of the Act to allow review of all freight tariff charges and conditions (other than a rate for the movement of traffic) by the CTA, upon application by the shipper.
- Make improvements to service level arbitration
    - Remove the requirement for an arbitrator to consider a railway's service obligations to other shippers to ensure railway is not given an unfair advantage through their privileged access to information.
    - Make the definition of operational terms published pursuant to the Fair Rail for Grain Farmers Act permanent, and amend the working of the regulations to remove from the list of items subject to a force majeure condition, those factors which are within a railways reasonable control.

The use of threats or intimidation by a railway as a supplier of transportation services with common carriage obligations in its dealings with shippers is unacceptable. In addition, these changes are designed to improve the effectiveness of two current shipper protection measures by broadening the Agency's scope of investigation of rail freight tariff terms and conditions and ensuring that railways are not excused from delivering service under a service level agreement by factors that are within railway control.

4. Pro-competitive measures

- Amend section 138 of the Act to allow the Agency to grant running rights to a shipper or railway company without requiring as a precondition of relief, proof of a rate or service failure by the host railway

- Make permanent the changes that extended the interswitching zones to 160 km for the Prairie Provinces.

Running rights and interswitching are two of the areas where regulators can ensure that there is a measure of direct competition between rail carriers by regulating access to their networks and – in the case of running rights – providing for entry by new competitors to stimulate competitive pressure on rail carriers.

5. Measures particular to the Grain Industry

- Add chickpeas and soybeans to Schedule 2 of the Act to bring these crops under the definition of regulated grains.

- Maintain the maximum grain revenue entitlement without change, while at the same time quantifying railway profitability on the export movement of regulated grain to demonstrate if and how it is a disincentive to investment.

It is important that the list of regulated grains be modernized to reflect current production patterns on the Canadian Prairies.

Recent railway underinvestment in grain handling capacity is symptomatic of their market dominance not just in the agricultural sector but in all sectors. Removing the rate protection afforded to the agricultural sector will not create any incentive for railways to increase investment in this sector and it will simply result in a further transfer of wealth from the Agriculture sector to railway shareholders.

All of the recommendations of the coalition are designed to improve the competitiveness of the rail freight industry by providing for an enhanced regulatory backstop for shippers in their day to day commercial and operational dealings with railways. With these improvements, shippers and railways will be induced to seek continued efficiency of the system while ensuring that rail service supports the growth and international competitiveness of Canada's rail freight supply chains.

1. Background of the coalition members

In response to the Federal Government's statutory review process for the *Canada Transportation Act*, a number of agriculture groups have come together to develop a joint submission to the 2014/2015 review process.

This coalition involves the largest agricultural product shippers and processors as well as a number of producer groups. The members of these organizations are responsible for the vast majority of rail shipments of bulk grains and processed grain products in Canada. The coalition members are:

- Canadian Oilseed Processors Association
- Manitoba Pulse Growers Association
- Western Grain Elevators Association
- Canadian Special Crops Association
- Keystone Agricultural Producers
- Inland Terminal Association of Canada
- Animal Nutrition Association of Canada
- Pulse Canada
- Agricultural Producers Association of Saskatchewan
- Canadian Federation of Agriculture
- British Columbia Agriculture Council
- Alberta Federation of Agriculture

This document presents a series of high level recommendations for changes in rail transportation regulation. The paper was prepared based upon input provided through consultation with the members of the coalition and with the benefit of ongoing discussion with a variety of other stakeholders both within and beyond the Agriculture sector. In addition, members of the coalition met with a member of the CTA review advisory panel and secretariat to discussion our general approach to legislative reform and feedback from that session was helpful in the further refinement and development of this paper.

Staff and consultants who contributed to the paper include two of Canada's preeminent lawyers with over 60 years of combined experience in rail regulation and operations.[5]

2. Problems with the Canadian rail freight system

Members of the coalition have been through a tumultuous year in their relationships with the railways. The major backlog of grain shipments which led the federal government to issue emergency orders regarding railway performance and their subsequent introduction of the *Fair Rail for Grain Farmers Act*

[5] The brief biographies of Mr. Forrest Hume and Mr. Ian MacKay are attached as an appendix to this paper.

which implemented temporary measures associated with rail volume targets and the extension of interswitching zones; have captured the public's and other rail user groups' attention.

However, the key problems with the Canadian rail freight system that were identified by shippers in these consultations reflect much deeper system concerns with the structure and regulation of the Canadian railway industry, than were addressed by recent government initiatives. The underlying problems with the Canadian rail freight system can be summarized in three areas: lack of investment in railway capacity, inadequate railway performance, and the inadequacy of current shipper protection measures.

2.1 Railway capacity

Shippers believe that railway capacity is limited by railway commercial self-interest and not by the needs of the users of the railway system. As a result, railways do not invest in the capacity to handle reasonable levels of variability in demand nor to handle normal annual problems caused by winter operations. Shippers are also concerned that the system will not be able to handle the increasing traffic that will inevitably come with growth of the Canadian economy.

During the last statutory review of rail freight service from 1999-2001, the review panel expressed concern with the financial viability of the railway system. They noted that – at the time of the review - the railways had only just begun to achieve the financial strength to allow them to invest capital beyond that required to keep up with the depreciation of their networks. However, with the turnaround in railway fortunes in the recent past they expressed the belief that, "Canada's mainline railways are now well positioned to make the capital expenditures needed to sustain and improve their systems, a finding that could not have been made a decade ago."[6]

Unfortunately, the response of railways to the highly deregulated freight railway market that they have enjoyed, as a result of a series of changes to legislation between 1987 and 2001, has been to focus upon improving their profitability and returns to shareholders without a corresponding increase in investment in their networks. This has been reflected in steadily decreasing operating ratios[7] at CN and CP and increasing operating income without corresponding increases in capital investment.

The chart below shows that over the period from 2000 to 2012, railway workload as measured by total revenue tonne kilometres[8] increased by 34%. Over the same period, railway net investment was negative for 10 of the 12 years of the period – meaning that railway capital investment was not sufficient to cover the consumption of capital assets as represented by depreciation. In that same 12 year period railway operating income increased by 46% to $4.25 billion and it grew an additional 13% in 2013 to $4.8 billion.

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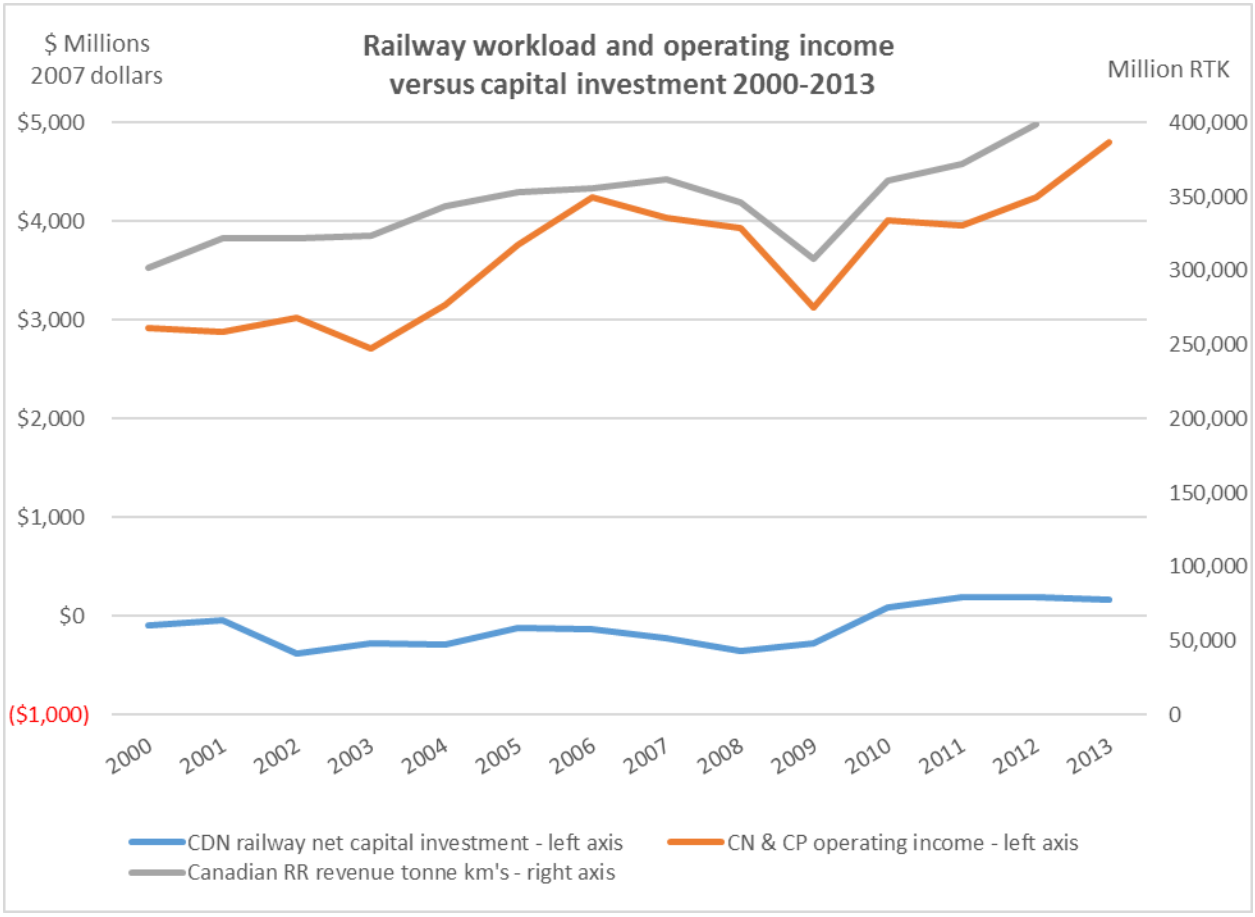
[6] *Vision and Balance – the report of the Canada Transportation Act Review Panel*. Minister of Public Works and Government Services. June 2001. Page 51

[7] An operating ratio is the measure of a company's operating costs/operating revenues.

[8] Revenue tonne kilometres, abbreviated RTMs are a measure of the total freight revenue tonnes handled by a railway multiplied by the total number of kilometres that the freight was moved. This is a good measure of the overall business level of a railway over time.

Figure 1 Railway workload and operating income versus capital investment.[9]



If railway service performance was satisfactory over this same period, shippers might not be so concerned about the diversion of railway profits to shareholders rather than into capital investment to improve service. However, as noted by the rail freight service review (RFSR) panel in their 2010 report, railway service has been inadequate to meet shippers' needs as demonstrated through the quantitative analysis conducted for that review and based upon the overwhelming consensus of stakeholders as demonstrated in their submissions to the review panel.

- The rail-based logistics system … has gone through a period during which rail service was less than adequate.
- While some of the service issues are attributable to non-railway stakeholders (these include poor forecasting and port and terminal congestion), most of the issues raised relate to railway behaviour.[10]

[9] Capital investment data – Statistics Canada CANSIM table 031-0002.
Net capital investment = total capital investment – straight line depreciation.
Railway revenue tonne kilometres, Railway Association of Canada reports.
Railway operating revenues as reported by CN and CP in their annual reports to shareholders.
[10] *Final Report of the Rail Freight Service Review*. Transport Canada. January 2011, page 22.

Unfortunately, as noted in the next section of this paper, rail service problems did not improve following the publication of the RFSR report in early 2011.

2.2 Railway performance

It is clear from the complaints of groups in the agriculture sector that led in part to the Government's imposition of minimum volume requirements and other changes to railway regulation contained in the *Fair Rail for Grain Farmers Act* that railways do not exhibit the types of market-responsive behaviour found in normal competitive markets. Instead, shipper/railway relationships are characterized by a lack of railway predictability and responsiveness to shipper commercial requirements. Recently, the Ag Transport Coalition[11] has commenced an initiative to provide on-going measurement of railway service performance.[12] This program involves grain and grain product shippers representing over 80% of the volume of export grain shipments in Canada including most of the companies that are members of the associations making up the Ag Transport Coalition.

Despite the attention and emphasis on grain movement as a result of Bill C-30 and the Order in Council, this program has revealed the following issues in the first 10 weeks of the current crop year, beginning August 1, 2014, up to the beginning of October:

- The railways supplied only 85% of total hopper car orders and only 60% of total box car orders to the shippers participating in the measurement initiative.
- In some rail car corridors, car supply is particularly poor. Rail car supply for shippers of grain to terminals in Vancouver for transloading and shipment via ocean containers was only 66% for participating CN shippers and 28% for participating CP shippers.
- The railways timeliness in supplying cars is also quite poor with only 50% of cars being supplied in the week for which they were ordered.
- Even after being loaded and released to the railways 62% of CN traffic and 74% of CP traffic sits on shippers' sidings for over 24 hours after it is loaded and released, before being picked up by the railways. If shippers had caused such delays, they would likely be subject to penalties under a tariff.
- For CP - 42% of grain traffic waited over 48 hours to be picked up.

It is important to note that this poor performance was being provided while the railways were under the minimum volume requirement regulations imposed by the Federal Government and during a time in the year when weather has been favourable to efficient railway operations.

This quantitative performance data is consistent with recent surveys of Canadian railway performance that show broad shipper dissatisfaction with railway performance. In a recent survey of North

[11] The Ag Transport Coalition consists of the following organizations: Canadian Canola Growers Association, Western Grain Elevators Association, Alberta Wheat Commission, Pulse Canada, Canadian Special Crops Association, Canadian Oilseed Processors Association, Inland Terminal Association, Manitoba Soy Growers: http://www.agtransportcoalition.com/

[12] Data for the measurement initiative is provided to the project administrator – QGI Consulting – from the participating shippers and rail car movement data is also obtained directly from the railways to support the performance measurement process.

American rail shippers conducted for RBC Capital Markets, 66% of CN shippers and 79% of CP shippers rated the railways service offering as "Poor" or "Fair".[13]

2.3 Railway market power

A lack of investment in railway capacity and poor service to shippers have their root cause in the abuse of market power by railways. That railways have significant market power is acknowledged by the existence within the *Canada Transportation Act* of specific shipper protection measures and common carrier obligations

The RFSR panel recognized that market power was the root cause of railway service problems in their 2011 report. The panel directly addressed the issue of market power and considered the broad range of quantitative analysis conducted in support of their work as well as the evidence provided by a wide range of stakeholders. On this issue it concluded that:

> *"…railways continue to have market power over some of their customers and that there are sectors and regions where competitive alternatives are limited or lacking altogether. This railway market power results in an imbalance in the commercial relationships between the railways and other stakeholders."*[14]

In a decision on a complaint made by Louis Dreyfus that CN was not fulfilling its service obligations, the Canadian Transportation Agency clearly recognized that railway market power could result in service levels being established which favour the railway over the grain shipper

> *"[13] The Agency is of the opinion that where competitive pressures are low or absent and where there is a relative low cost to the railway company for delaying traffic or otherwise reducing the level of service, the supply of cars and motive power will tend to be set at a level that favours railway company (producer) preferences over shipper (consumer) preferences."*[15]

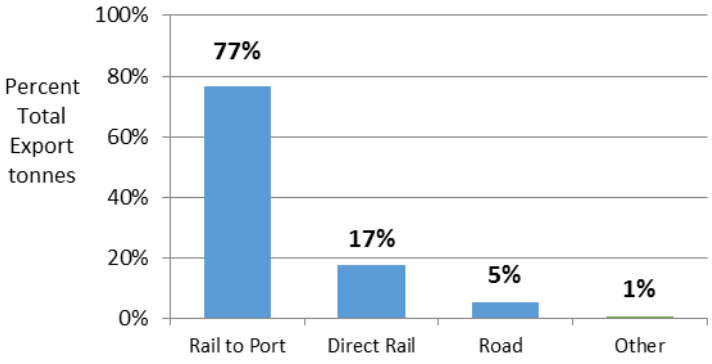
In the grain industry, this market power is particularly strong. There are no viable competitive options for grain exports in Western Canada. As shown by the chart below, 94% of Canadian Grain exports utilize railways for shipments to port or directly to customers in Canada and the United States.

[13] RBC Capital Markets North American Railroad Shipper Survey, December 2014.

[14] RFSR Panel Final Report. Page 41

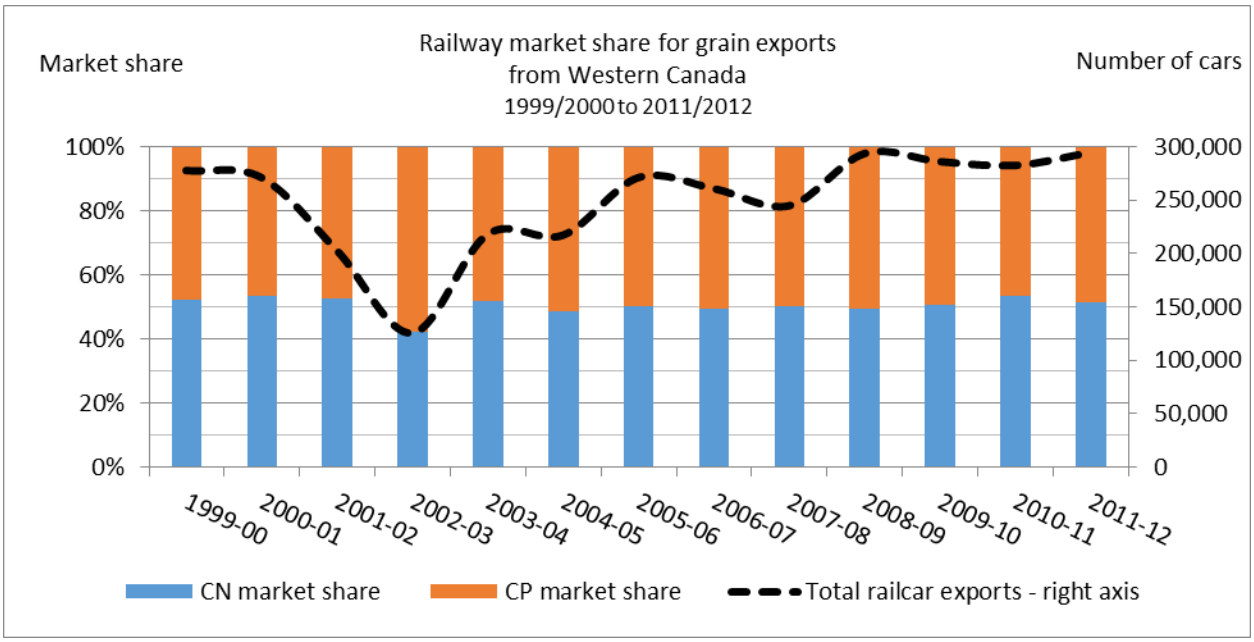
[15] Interlocutory Decision No. 2014-10-03, Redacted version, October 3, 2014, Application by Louis Dreyfus Commodities Canada Ltd. against the Canadian National Railway Company, pursuant to section 116 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended.

Figure 2 Canadian grain exports by mode of transport[16]



Within the rail industry, meaningful competition does not exist. The chart below in Figure 3 shows that shifts of volume between Canada's two main railways from year to year are very minor and do not display any sign of meaningful competition between the carriers.[17] Indeed, only a very small minority of grain elevators in Western Canada are served by more than one railway.

Figure 3 Railway market share for grain transportation[18]



[16] Source: Statistics Canada

[17] The decline in CN market share in grain year 2002/03 was due to particularly poor crop production in the areas served by CN, as indicated in the line on the graph showing that total export volumes in that year were particularly low.

[18] Source: Quorum Corporation

2.4 Current shipper protection measures

In this environment where grain shippers are highly dependent upon a rail system that lacks effective competition, regulatory measures to protect shippers from abuse of market power are essential.

National Transportation Policy as expressed in Section 5 of the *Canada Transportation Act* recognizes that while competition and market forces are the prime agents in providing viable and effective transportation services, regulation and strategic public intervention are used when economic, safety, security, environmental or social outcomes cannot be achieved by market forces alone. Section 113 of the Act explicitly recognizes that railways have common carrier obligations to all shippers. In addition, the Act contains a number of specific shipper protection measures designed to protect shippers from the market power of railways and to attempt to rebalance the commercial relationship between shippers and railways, in recognition of this market power.

Imbalance of access to information

The shipper protection measures of the *Canada Transportation Act* rely on a formal shipper complaint or application and the shipper carries 100% of the burden of the case. However, in most cases where problems arise, the evidence of the problem is in the possession of the railway. The Canadian Transportation Agency relies heavily on the evidence presented by shippers and only rarely does it use its own powers of investigation to ask questions to find the underlying cause of a complaint. For a shipper to be successful, this means it must contract with experts in railway operations and economics to provide evidence to the Agency to support the complaint or application (at considerable expense). A shipper must also ask extensive interrogatory questions of the railways, since they possess the information (interrogatories are inevitably opposed on various grounds).

Cost of processes and limitations of Agency role

The shipper protection measures of the Act also contain a number of conditions associated with their use. These conditions lead inevitably to legal argument as to their application in the circumstances. Complaints sometimes turn on legal interpretations of the statute rather than on the merits of the shipper's case. Being successful requires perseverance and deep pockets. Final Offer Arbitration cases, for example, can cost $1 million to pursue. Level of service arbitrations cost less, but can run to a quarter of that amount or more, depending upon the need for expert evidence, and the requirement to defend against preliminary objections from the railway

The recent Canola Growers case demonstrates the challenge facing shippers who want to use shipper protection measures. In that case, the Canola Growers filed a level of service complaint against CN and CP based on the service problems of the winter of 2013-2014.[19] Although these problems were well known and led to the unprecedented emergency order from the Government establishing railway minimum grain volume requirements, the Agency was unable to intervene without a sufficiently grounded complaint.

[19] Decision No. 360-R-2014, October 1, 2014, COMPLAINT filed by Canadian Canola Growers Association against Canadian National Railway Company and the Canadian Pacific Railway Company pursuant to sections 26, 37 and 116 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended.

The burden of proving the railways' failure fell entirely on the Canola Growers. Publically known facts about the difficulties were not considered nor did the Agency exercise its legal powers of investigation to gain greater insight into the actions of the railways.

Shipper fear of retribution

Level of service complaints under section 116 of the Act and rail service level arbitration under section 169.31 require a shipper to engage in a very adversarial process with the aid of legal counsel and often other professional consulting support. In addition, once the process has run its course, the shipper remains in the same position of vulnerability to railway market power as was present prior to the beginning of the process. Challenging a railway under these conditions always raises concerns about retribution among shippers. Difficult negotiations with a railway which end without a satisfactory agreement and then require the shipper to enter the uncertainty of the regulatory process may further damage their relationship with their critical transportation supplier. While a case proceeds, relationships with the railway can become worse.

This places a great deal of pressure on a shipper to accept the railway's last offer for fear of having to accept something worse later. Railways take advantage of this dynamic to make "take it or leave it" offers knowing that the shipper cannot "leave it". When a sole supplier says, "take it or leave it", the threat is obvious. Shippers deeply resent these tactics which, given the railway's monopoly position and level of service obligation, must be considered sharp practice. Threats of any kind and particularly those that imply that service could be interrupted should be prohibited.

2.5 The need for change

Given the problems identified with railway capacity, railway service performance and the lack of fully effective shipper protection measures, the members of the Coalition believe that further measures must be taken to create a regulatory regime that ensures the rail system provides capacity and service to meet the *needs of the users of the system*.

As the root cause is an imbalance of market power between participants, the solutions recommended below are designed to off-set railway power to ensure that railways behave in ways that simulate the operation of a market driven system.

3. Recommendations

In the development of proposed enhancements to the Canadian rail regulatory regime, staff and legal consultants considered over 30 distinct proposals for change. Each proposal was assessed for feasibility and impact based upon the experience of the group and recommended changes were identified in the following five areas:

- Powers and effectiveness of the Agency
- Railway service obligations
- Shipper protection measures
- Pro-competitive measures
- Measures particular to the grain industry

3.1 Powers and effectiveness of the Agency

The Canadian Transportation Agency (the Agency) has the central role in the economic regulation of Canadian railways and in the administration of various shipper protection and dispute resolution processes laid out in the *Canada Transportation Act*. As an independent and quasi-judicial tribunal, the Agency needs to be given clear guidance in legislation to ensure the effective regulation of railway market power.

The Agency's challenge to be an effective regulator depends on having clear powers, mandate, and information available to make decisions and the resources to effectively execute its mandate.

Power to address system wide issues and act quickly

There are circumstances where the exercise of market power by railways raises ***system wide problems*** with the transportation system as opposed to shipper specific problems. Last winter's grain shipping backlog is an example of a network problem requiring a system wide solution. However, the legal requirement that a formal complaint be made before the Agency may act, means that the case is limited to the facts of that complaint brought by a single shipper. It also means that the Agency must wait until the complaint is made, leading to delay in addressing underlying causes. At times, emerging problems will be apparent to stakeholders and action may be urgently required to address system backlogs before commercial damage is done to shippers or receivers - either directly through loss of business or indirectly through damage to Canada's reputation as a reliable supplier.

Shipper protection against retribution

In addition, as noted earlier, shippers are often reluctant to engage in the adversarial processes that are required under both section 116 complaints and service level arbitration. A stronger and more empowered Canadian Transportation Agency would allow the Agency to resolve some problems without the need for a shipper complaint removing some of the pressure from shippers to place themselves in a vulnerable position by having to "take on" their railway supplier in an expensive and adversarial process.

Access to complete, independent and timely information about the rail freight transportation system

In order for the Agency to effectively regulate, it needs to have complete information on the operation of the rail system including both service performance and conditions of carriage and pricing at a detailed level, while protecting confidentiality of sensitive commercial information.

In addition, shippers need to be empowered with both railway performance and high level railway pricing information to re-balance their position when negotiating with railways which currently have a monopoly on railway market performance and pricing data.

Recommendation 1

Restore the Canadian Transportation Agency's power to act on its own motion and ex parte[20]

- This would allow the Agency to investigate and take measures and give orders without the need for a service level complaint to be brought by a shipper or other person.
- This protects individual shippers (particularly captive shippers) from having to take on their powerful railway supplier.
- Allowing the Agency to act ex parte permits it to address urgent service problems, without the need for an extensive investigation and delays prior to making a temporary order.

These are not exceptional powers in Canadian economic regulation. The Agency's predecessor, the National Transportation Agency, had broad powers to address problems without a formal complaint by virtue of its ability make rules, orders and regulations respecting anything within its jurisdiction and to hear and determine on its own motion anything concerning a license or permit issued.[21] The National Energy Board[22] and the Canadian Radio-television and Telecommunications Commission[23] have the power to act without complaint to address things within their jurisdiction. The former National Transportation Agency had power to make interim ex parte orders[24]

[20] An ex parte order is one made on the request of and for the benefit of one party only. This is an exception to the basic rule of legal procedure that both parties must be present at any argument before a decision is rendered. As a result, ex parte matters are usually temporary orders made to deal with urgent situations pending a formal hearing or investigation.

[21] *National Transportation Act*, 1987. (RSC 1985 (3rd Supp.), c.28, ss.27, 35

[22] *National Energy Board Act* (RSC 1985, c.N-7, s.12)

[23] *Telecommunications Act* (SC 1993, c.38, s. 9(2)); Broadcasting Act (S.C. 1991, c.11, s.18(3))

[24] *National Transportation Act*, 1987. (RSC 1985 (3rd Supp.), c.28, s.40(3)

Recommendation 2

Improve the Agency's sources of information about the rail freight transportation system

To be effective the Agency needs to have access to comprehensive information about the capabilities and performance of the rail freight logistics system. This information can be provided by: enhanced railway reporting to the Agency; by comprehensive and timely railway service monitoring by an independent monitor; and through a greater engagement by the Agency with a wide range of stakeholders on an on-going basis.

Today, the Agency's principal source of information is the evidence presented to it by parties when a complaint is made. Because this evidence is typically limited to the case, and complaints must be dealt with within the 120 day statutory deadline, the Agency has no means to easily assess whether or how system wide issues have contributed to the problem.

2a Enhance railway reporting to the Agency

The Agency currently collects information about railway costs to support railway interswitching rate determinations and maximum review entitlement calculations. However, this alone is not sufficient to ensure a complete picture of what is happening in the rail network. Railways should be required to file with the Agency:

- Five year, annual and seasonal operating plans including factors such as targeted asset levels (crews, locomotives, rail cars) and expected traffic and performance levels.
- Confidential contracts with shippers and agreements affecting operations between railways.
- Waybills on all traffic handled on Canadian railways

Carload waybill data for movements within Canada would provide reliable information about traffic that actually moves in the rail network as well as information about revenue. Class one railways, including CN and CP, provide such data to the Surface Transportation Board in the United States on their movements there. The STB uses this information for analyses and studies. Although the disaggregated information is confidential, the STB can grant permission to governmental agencies and others to use the information in certain specified situations. The STB also issues a "Public Use Waybill Sample" that contains aggregated waybill information.

Railway waybill data should be provided by railways in Canada and a public use waybill sample should be published. This would provide greater transparency on railway activities while harmonizing Canadian requirements with those in the U.S.

In order to address shipper needs, annual summaries of key railway revenue and cost factors should be published at levels of detail necessary to identify and resolve problems. The combination of waybill sample data and cost data will empower shippers in their commercial discussions with railways who currently have a monopoly on railway commercial market data. It will also help the Agency to identify

situations where market dominance is apparent and allow the Agency to pay particular attention to service in those markets.

2b Provide in legislation for independent, detailed, comprehensive and timely monitoring and reporting on railway service performance for all commodities.

Monitoring of rail transport under statutory authority should not be limited to grain movements as is the case today under the current Grain Monitoring Program. Because rail capacity is allocated among different commodities and shippers, it is essential, for a complete picture that the entire system be monitored.

The railways must be required by legislation and supporting regulations to provide detailed shipper demand and railway operational performance information to an independent railway service monitor. The monitor will develop and publish performance measurements for all commodities and corridors and will provide the Agency with support in railway performance analysis as required. This monitoring must be published on a timely basis; at least monthly for performance in the previous month and the monitor must have the independence to publish performance data without the intervention/approval of a government department or Agency.

The department or Agency of government that is given responsibility for administering the work of the independent railway service monitor should establish a permanent advisory board composed of stakeholders representing all primary rail user groups. This board would assist in the establishment of the monitor's operating terms of reference and receive briefings from and provide advice to the monitor on an ongoing basis regarding reporting of railway service performance.

2c Ensure that the Agency has the responsibility, authority and resources to engage on an on-going basis with stakeholders in the rail freight transportation system.

A significant benefit of a well-informed, empowered Agency with the power to act on its own motion is that shippers do not have to wait until there is a disruption in their own service or a system wide disruption, before the Agency can react and take corrective action. In addition to be effective the Agency needs to be listening and learning from system stakeholders. This will require the Agency to be more proactive in:

- having meetings with industry;
- holding hearings in important cases and rule makings;
- actively analyzing information and maintaining high; levels of current awareness; and
- having appropriate in-house expertise to assess information.

In order to achieve these enhanced responsibilities of the Agency, they must be provided with the financial and human resources necessary for their execution.

3.2 Railway service obligations

Statutory description of railway service obligations

In the absence of a need to compete for a shipper's traffic, a railway is free to provide a service that meets its needs in priority to those of a shipper. The historical basis for the level of service obligations imposed on railways was recognized in Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co quoting from Leslie's Law of Transport by Railway, 2nd ed.: it is said that the railway companies, numbers of which had been incorporated by special Acts prior to 1854, had well-nigh driven their competitors by road out of business and had obtained a monopoly without corresponding duties being imposed upon them by their statutes of incorporation. Parliament, therefore, by the Act of 1854, laid upon them the general duty of affording reasonable facilities for the receiving, forwarding and delivering of traffic. Similar provisions have been part of the statute law of Canada since 1903.

Today, railway service obligations are established primarily in sections 113 and 114 of the *Canada Transportation Act*. The Act requires railways to furnish, "adequate and suitable accommodation" for traffic offered for carriage on the railway and to move the traffic "without delay, and with due care and diligence." At present, the wording of the sections governing railway service obligations do not by themselves provide guidance as to how "adequate and suitable" service levels should be established. Coalition members believe that it's critical that the obligations of railways to establish service levels which satisfy rail users' commercial requirements are more clearly identified in this section of the Act.

The Canadian Transportation Agency's recent decision rendered pursuant to a complaint by Louis Dreyfus Commodities Canada against Canadian National provides some helpful guidance as to how the language in the Act might be improved. The CTA decision in this case laid out a very clear explanation of railway level of service obligations and how they should be applied. In particular, the Agency noted that it is important to consider railway service in the context of national transportation policy.

> *"[19] The level of service provisions must be read in light of the national transportation policy, which addresses the need for a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment at the lowest possible cost. In order to advance the national transportation policy's objective of enabling competitiveness and economic growth in both urban and rural areas throughout Canada the provisions must be read in a manner that ensures that the Canadian economy is not negatively affected by the practices or preferences of railway companies where they unduly restrict the ability of shippers to move their goods."*[25]

National Transportation Policy and the Agency's decision in the Louis Dreyfus decision make clear that it is the financial health of shippers and receivers that is protected by sections 113 to 115 of the Act and that railway service must accommodate the growth of business and not impose a constraint upon it. The Agency's decision in the Louis Dreyfus case stipulated that shippers needed to provide advance notice to the railways of their service demands. However, the decision also noted that the onus was

[25] Interlocutory Decision No. 2014-10-03, Redacted version, October 3, 2014, Application by Louis Dreyfus Commodities Canada Ltd. against the Canadian National Railway Company, pursuant to section 116 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended

upon the rail carrier to demonstrate that a railway's failure to satisfy service demands that are communicated in advance, was reasonable.

However, while the Louis Dreyfus case decision provided a clear and helpful framework for the determination of railway service requirements, previous Agency and court decisions have not always been as favourable to shippers nor provided such clear guidance. In order to ensure that the principles governing railway service obligations embodied in the Louis Dreyfus decision are clearly established in legislation, the following changes to the Act are recommended.

Recommendation 3

Align level of service provisions of the Act with National Transportation Policy to stress that the needs of the users of the system are paramount.

Make clear through amendment to the level of service provisions that railway services must meet the needs of the users of the system and promote competitiveness and economic growth and that the commercial needs of the users of the system are paramount in any consideration of railway service performance.

Need for balanced accountability

Railway tariffs impose a wide variety of conditions upon shippers, related to the movement of traffic. In addition to the freight charges assessed by railways, additional terms and charges are applied governing the way in which shippers must provide shipment information, order empty rail cars, and conditions are also applied to the time allowed to shippers to load and unload rail cars.

Railways apply charges to shippers who fail to meet the conditions established in tariffs, however railways are not subject to any charges for their failure to supply cars or move traffic against a similar set of conditions as those which are imposed on shippers.

During the Rail Freight Service Review, the desire for more balanced accountability for service performance between shippers and railways was a dominant theme. The RFSR panel, in their report recommended that railways should establish service level agreements with their shippers and that shippers should have the right to an arbitrated agreement if one could not be obtained through negotiation. Bill C-52 was introduced by the Government and passed by Parliament amending the *Canada Transportation Act* to provide for rail service level arbitration by the Canada Transportation Agency. However, the current process as provided for in the Act does not allow a shipper to include financial consequences for non-performance in the terms submitted for arbitration.

In a free market, a supplier who fails to meet commitments or refuses to make commitments loses the business. No such market discipline exists for railways. Provisions to allow for penalties or liquidated damages to be assessed to railways are intended to simulate the results that the market would otherwise provide; that is, impose a consequence for failing to meet or make commitments.

In addition, the current powers of the Agency under Section 116 do not allow the Agency to award damages to a shipper in cases where a railway has not fulfilled their service obligations. The Act should be amended to permit the Agency to award damages upon finding a breach of the level of service obligation. Damages compensate a person for all losses that flow from a breach not just out-of-pocket

expenses. Recent changes to the *Canada Transportation Act* only allow the Agency to award compensation for expenses. Damages are not be available to compensate a shipper, for example, for loss of a customer flowing from a service failure.

The Act already has provisions in another section to require a railway that compensate for loss or damage from railway construction.[26]

Recommendation 4

Provide for financial consequences for non-performance in service level agreements and in Agency decisions on service level complaints.

4a Consistent with the recommendations of the Rail Freight Service Review Panel, amend the *Canada Transportation Act* to allow shippers to include financial consequences for railway performance failures in service level arbitrations.

4b Provide the Agency with power to award damages against the railway on a finding that the railway is in breach of its level of service obligations.

3.3 Shipper protection measures

Threats or intimidation

While most shippers recognize the value of the existing shipper protection measures in the Act, many are reluctant to use adversarial processes with their railway suppliers, both for fear of retribution and because such processes can be perceived to inhibit the development of positive day to day operating relationships between shipper and railway. In addition, some shippers have been subject to threats and intimidation by railway representatives when shippers communicate that they may be required to resort to regulatory processes if commercial negotiations fail. It must be made very clear that any use of threats or intimidation towards shippers by railways, is unacceptable.

Recommendation 5

Make the use of threats and intimidation by railway employees punishable by fines.

The existence of such penalties in law would impose a positive obligation on directors and officers of the railways to create a culture in their organizations that prevents the use of intimidation in dealings with customers.

Agency review of freight charges and conditions

In a recent ruling, the Canadian Transportation Agency concluded that section 120.1, as written, may only be used to challenge unreasonable terms and conditions found in a tariff when the term and conditions relate to a charge. This means that unreasonable terms and conditions that are not related

[26] An example of other federal laws allowing damages to be awarded is the federal Copyright Act. It includes a scheme of liquidated damages, at the option of the copyright holder, to compensate for breach of copyright.

to a charge are not reviewable under section 120.1. For example, unreasonable car ordering terms and conditions would not be reviewable. This anomaly should be corrected.

Recommendation 6

Amend Section 120.1 of the Act to allow review of all freight tariff charges and conditions (other than a rate for the movement of traffic) by the CTA, upon application by the shipper.

Improvements to service level arbitration

The service level arbitration provisions of the Act, introduced with Bill C-52, have provided a new shipper protection measure. While these new provisions were welcomed, it was recognised by shippers that that there were important gaps in the legislation. These gaps remain unaddressed. In addition to the amendment already referenced that would include financial penalties for non-performance by a railway as matter subject to arbitration, shippers would like to see removed the requirement that the railway's obligations to other shippers and persons be considered by an arbitrator in determining his/her decision in a service level arbitration.

There are two primary reasons for this. Firstly, the provision puts the shipper at a distinct disadvantage in arbitration and requires the shipper to engage experts and to incur additional costs to argue on this matter, from a position of distinct disadvantage. Secondly, and more importantly, this matter should be irrelevant to an arbitrator's decision, as was clearly established in the Louis Dreyfus case. In this case, it was determined by the Agency that:

> *"[23] The CTA is specific about the railway company's duty, which is to provide adequate and suitable accommodation for "all traffic offered for carriage…" That is to say the obligation of a railway company is owed to each individual shipper in respect of whatever traffic is tendered to the railway company by each shipper. It does not imply that a breach to one shipper is acceptable if there are breaches to others. It also does not imply that a superior level of service to one shipper excuses or justifies an inferior level of service to another shipper. .." and*
>
> *[24] In other words, the compliance of a railway company with its level of service obligations to a shipper must be assessed having regard to that specific shipper's individual requests for rail services, not simply according to the railway company's assessment of the combined requests of all shippers or of groups of shippers…"*[27]

In addition, the recently published *Regulations on Operational Terms for Rail Level of Services Arbitration*[28] includes in section 2(2)(i) a long list of circumstances that might excuse a railway company from its service level obligations under a service agreement. This list includes many matters that are under railway control. A better, simpler and less ambiguous way to deal with such matters is through

[27] Interlocutory Decision No. 2014-10-03, Redacted version, October 3, 2014, Application by Louis Dreyfus Commodities Canada Ltd. against the Canadian National Railway Company, pursuant to section 116 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended

[28] SOR/2014-192

the use of a standard force majeure clause which excuses a party to an agreement from their obligations for matters which are beyond their control, but which obligates the party to take reasonable measures to exercise due diligence to both prevent circumstances that might cause them to fail and to deal expeditiously with any such circumstances if they should occur.

Recommendation 7

Make improvements to service level arbitration

7a Delete section 169.37(d) requiring the arbitrator to consider a railway's service obligations to other shippers and persons

7b Make the definitions of operational terms published pursuant to *Fair Rail for Grain Farmers Act* permanent and amend the wording of section 2(2)(j) make reference to Force Majeure and delete the itemized list of circumstances referred to in subsections (i) through (x):

- (i) a superior force, including a flood, fire or other natural disaster,
- (ii) a war or insurrection,
- (iii) a riot, strike or lock-out,
- (iv) a derailment,
- (v) a blockage of rail lines due to an accident, demonstration, natural cause or other cause,
- (vi) any condition related to the loading of cars,
- (vii) a failure of the shipper to comply with conditions that are associated with the performance by the railway company of service obligations under section 113 of the Act,
- (viii) the inability of the railway company to access a terminal or a delay in accessing it,
- (ix) the inability of the railway company to transfer the shipped traffic to another railway company or a delay in transferring it, and
- (x) a breakdown in a component of the railway

3.4 Pro-competitive measures

The railway industry in Canada is a natural monopoly or duopoly in virtually all markets. Market power, as discussed earlier, can result in the railways setting rate and service levels and making investment decisions that result in inadequate service to shippers. In a natural monopoly such as the railway industry, limited opportunities exist to increase direct competition between the railways and to thereby improve railway service.

Running Rights and Interswitching

Currently Section 138 of the Act provides for a railway company to apply to the Agency for the right to use another railway's track and to run and operate its trains over the host railway. The Agency may grant that right and impose conditions on either railway company, "as appear just or desirable to the Agency, having regard to the public interest."

Unfortunately the test that has been applied by the Agency with regard to the public interest is that the applicant for running rights must prove that there is an abuse of market power or market failure in their rail freight market in order to allow the consideration of a running rights application. The running rights remedy is treated as an extraordinary measure that can only be used in extremely limited cases. [29]

As a result, it has not been effective as a shipper relief measure or as a measure to increase competition in the railway industry even though there are no meaningful operational barriers to the use of running rights. Indeed, all major railways in North America have extensive running rights and haulage rights arrangements with other railways. Railways have developed very effective operating protocols for managing the movement of trains of another railway on their own networks. CN and CP have extensively used running rights to improve the efficiency of their joint operations, particularly in the congested corridor between Kamloops and Vancouver, BC. However, in Canada these arrangements have only served to improve operational efficiency and have not been a source of increased competition.

As there are no insurmountable operational or financial barriers to allowing a carrier to apply for running rights on behalf of a shipper with the intention of increasing the rate and service competition in the Canadian railway network, the current restrictions on the use of the running rights remedy should be removed.

Interswitching is the transfer of rail traffic from the lines of one railway to the lines of another railway, within regulated distances and at regulated rates. Interswitching can introduce direct railway competition to shippers who are within the prescribed interswitching zones. Up until this year with the introduction into Parliament of *Fair Rail for Grain Farmers Act*, the maximum normal distance over which regulated interswitching rates applied was a 30 km radius from a shippers facilities to those of a competing railway. The Canadian Transportation Agency extended this distance to up to 160 km for all shipments on sidings located in the Prairie Provinces as requested by the government. While interswitching introduces limited competition in duopoly railway markets where neither party has a substantial competitive advantage over the other railway, it can be helpful in specific cases and is one of the few measures that provide for direct competitive pressures in the Canadian railway industry.

Recommendation 8

Improve the current pro-competitive measures in the *Canada Transportation Act*

8a. Amend section 138 of the Act to allow the Agency to grant running rights to a shipper or railway company without requiring as a precondition of relief, proof of a rate or service failure by the host railway

8b. Make permanent the changes to interswitching.

[29] See CTA Decision No. 505-R-2002, September 10, 2002 IN THE MATTER OF an application filed by Ferroequus Railway Company Limited, pursuant to subsections 138(1) and (2) of the Canada Transportation Act, S.C., 1996, c. 10, seeking the right to run and operate its trains on and over specified lines of the Canadian National Railway Company between Lloydminster, Saskatchewan and Prince Rupert, British Columbia and between Camrose, Alberta and Prince Rupert, British Columbia; and IN THE MATTER OF a hearing held in Winnipeg, Manitoba from April 29 to May 8, 2002.

3.5 Measures particular to the Grain Industry

Chickpeas and Soybeans in Schedule II

With the evolution of cropping patterns in Western Canada it is the view of the Coalition that a modernization of Schedule II of the Canada Transportation Act should take place. In particular, the rapid expansion of soybean production in Western Canada must be recognized within Schedule II as well as the addition of chickpeas. This will ensure these crops fall under the purview of all statutory instruments of the Act and receive the full benefit of recommendations outlined in this document.

Recommendation 9

Add chickpeas and soybeans to Schedule 2 of the Act to bring these crops under the definition of regulated grains.

Maximum Grain Revenue Entitlement

The revenue cap, more properly called the Maximum Grain Revenue Entitlement is provided for in sections 150 and 151 of the *Canada Transportation Act*. It is NOT a fixed cap on railway revenues for grain.

It ensures that any escalation in railway grain revenue from year to year reflects railway cost inflation, the volume of grain moved and the average length of haul of the movement. Railways make more money if they move more grain and they obtain 100% of any cost efficiency improvements that they achieve in the movement of the grain from one year to the next. The GRE only applies to grain routed for export through Canadian west coast ports, and eastern shipments ending at Armstrong and Thunder Bay. It does not apply to grain originating in Canada and shipped to the United States or Mexico, or east of Thunder Bay. The formula to determine a railway's maximum grain revenue entitlement is:

$$[A/B + ((C - D) \times \$0.022)] \times E \times F$$

Where:

- A is the company's revenues for the movement of grain in the base year;
- B is the number of tonnes of grain involved in the company's movement of grain in the base year;
- C is the number of miles of the company's average length of haul for the movement of grain in that crop year as determined by the Agency;
- D is the number of miles of the company's average length of haul for the movement of grain in the base year;
- E is the number of tonnes of grain involved in the company's movement of grain in the crop year as determined by the Agency; and
- F is the volume-related composite price index as determined by the Agency.

The base year values A, B, and D are established in the Act separately for CN and CP so the only year-over-year variables that affect the determination are the carriers' maximum revenue in a particular year are the volume of the movement, the average length of haul and the change in the volume-related composite price index.

It has been suggested that the maximum grain revenue entitlement results in a reduction in the quality of grain service as railways are – as a result of the GRE – reluctant to invest in additional capacity to move grain products.

The obligation of railways to move grain is governed under their common carrier obligations and the return that they can earn from this commodity has been regulated over many years in recognition of their extraordinary market and rate making powers in this highly captive industry. The GRE regime which was introduced in August 2000 is only the latest example of railway rate regulation in the grain industry.

Railways' overall level of investment in their networks has been inadequate, as demonstrated by the data presented in Section 2.1 of this paper already demonstrated. However, there is no evidence that it is the GRE in particular that is causing problems with rail service in the grain industry. On the contrary, grain shippers do not see better service on shipments originating in Canada that are destined to the United States or Mexico, even though these movements do not fall under the GRE program.

Furthermore, as noted earlier, railways have benefited greatly from the current rate regime which allows rates to rise based upon a railway cost inflation index, but does not reflect the substantial cost reductions that railways have achieved through network consolidation and through increases in train length and reduction of crew costs due to extended runs. While the original rate levels established in 2000 provided for a contribution to railway constant costs of 27% over long term variable costs, most current estimates of the current level of railway profitability of grain movement are much higher than they were at that time – in excess of 40%.[30]

Based upon grain shippers' experience in commercial non-regulated corridors, it is unlikely that the removal of the GRE, on its own, will result in any railway investment in service improvements and the evidence is overwhelming that railways today earn much more than adequate returns on grain to support increased levels of investment beyond current levels.

Some stakeholders have erroneously suggested that changes should be made to the GRE in order to incent railways to make additional investments to improve capacity and service. The current MRE

[30] See CTA Decision No. 67-R-2008, February 19, 2008 IN THE MATTER OF the determination by the Canadian Transportation Agency of the 2007-2008 volume-related composite price index required for Western Grain Revenue Caps established pursuant to Part III, Division VI of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended, and IN THE MATTER OF Bill C-11, an Act to amend the *Canada Transportation Act* and the *Railway Safety Act* and to make consequential amendments to other Acts, which received Royal Assent on June 22, 2007, and specifically, Clause 57 of Bill C-11 which allows for an adjustment to the volume-related composite price index for the maintenance of hopper cars used for the movement of grain, and IN THE MATTER OF Canadian Transportation Agency Decision No. 388-R-2007 dated July 31, 2007, which established an interim 2007-2008 volume-related composite price index effective August 1, 2007.

formula provides for a very generous return over railway long run variable cost to provide sufficient return to incent long term investment. The coalition believes that before any changes are considered to the GRE, railway profitability on the export movement of regulated grain in Canada should be independently quantified and assessed by a third party. This, in combination with the enhanced performance measurement regime described in Recommendation 2b, will inform the debate about the capability and responsibility of railways to make investments in grain transportation to meet the needs of the grain industry.

Railways have a common carrier obligation to move all grain that is offered for movement in a timely manner that meets the needs of the shipper.

Recommendation 10

Maintain the maximum grain revenue entitlement without change, while at the same time quantifying railway profitability on the export movement of regulated grain to demonstrate if and how it is a disincentive to investment.

Biographies of legal advisors

Forrest Hume

Forrest C. Hume is a partner in Davis LLP and works in the firm's Vancouver office. Forrest has over 34 years of experience in transportation law and litigation. He has appeared before federal courts and tribunals involving administrative issues, arbitration and mediation proceedings, civil proceedings as well as judicial review and appeal hearings. He recently appeared before the Supreme Court in an important matter involving the application of fuel surcharges to confidential contracts. (See Canadian National Railway vs. Canada, Peace River Coal and Canadian Industrial Transportation Association.)

Forrest has an extensive career in transportation including being the in-house counsel for both Canadian National and then for Canadian Pacific railways between 1984 and 1994. In 1994, Forrest returned to private practice and has represented shippers, ports terminals, all levels of government and commuter rail authorities.

Ian S. MacKay

Ian MacKay has over twenty-eight years of experience as a lawyer in transportation and as an executive in the Government of Canada including as Senior Legal Counsel for Transport Canada Legal Services and as Legal Counsel to the *Canada Transportation Act* Review Panel of 2000.

Ian is a railway regulation expert with an insider's knowledge of the operations of both federal departments and regulatory agencies. In addition, Ian has advised rail shippers and shipper associations in both commercial and regulatory matters. He has been in private practice since 2007.

In the agricultural sector, Ian was Legal Counsel to the Canadian Transportation Agency for the Canadian Wheat Board's level of service complaint of 1997-98 and was Legal Counsel to the working group on Rail Competition and Safeguards during the Kroeger enquiry.

4. Summary of Recommendations

Recommendation 1 **Restore the Canadian Transportation Agency's power to act on its own motion and ex parte**[31]

Recommendation 2 **Improve the Agency's sources of information about the rail freight transportation system**

2a Enhance railway reporting to the Agency

2b Provide in legislation for independent, detailed, comprehensive and timely monitoring and reporting on railway service performance for all commodities.

2c Ensure that the Agency has the responsibility, authority and resources to engage on an on-going basis with stakeholders in the rail freight transportation system.

Recommendation 3 **Strengthen level of service provisions of Act**

Make clear through amendment to the level of service provisions that railway services must meet the needs of the users of the system and promote competitiveness and economic growth and that the commercial needs of the users of the system are paramount in any consideration of railway service performance.

Recommendation 4 **Provide for financial consequences for non-performance in service level agreements and in Agency decisions on service level complaints.**

4a Consistent with the recommendations of the Rail Freight Service Review Panel, amend the *Canada Transportation Act* to allow shippers to include financial consequences for railway performance failures in service level arbitrations.

4b Provide the Agency with power to award damages against the railway on a finding that the railway is in breach of its level of service obligations.

Recommendation 5 **Make the use of threats and intimidation by railway employees punishable by fines.**

[31] An ex parte order is one made on the request of and for the benefit of one party only. This is an exception to the basic rule of legal procedure that both parties must be present at any argument before a decision is rendered. As a result, ex parte matters are usually temporary orders made to deal with urgent situations pending a formal hearing or investigation.

Recommendation 6 **Amend Section 120.1 of the Act to allow review of all freight tariff charges and conditions (other than a rate for the movement of traffic) by the CTA, upon application by the shipper.**

Recommendation 7 **Make improvements to service level arbitration**

7a Delete section 169.37(d) requiring the arbitrator to consider a railway's service obligations to other shippers and persons

7b Make the definitions of operational terms published pursuant to *Fair Rail for Grain Farmers Act* permanent and amend the wording of section 2(2)(j) make reference to Force Majeure and delete the itemized list of circumstances referred to in subsections (i) through (x).

Recommendation 8 **Improve the current pro-competitive measures in the *Canada Transportation Act***

8a. Amend section 138 of the Act to allow the Agency to grant running rights to a shipper or railway company without requiring as a precondition of relief, proof of a rate or service failure by the host railway

8b. Make permanent the changes to interswitching.

Recommendation 9 **Add chickpeas and soybeans to Schedule II of the Act to bring these important crops under the definition of regulated grains.**

Recommendation 10 **Maintain the maximum grain revenue entitlement without change, while at the same time quantifying railway profitability on the export movement of regulated grain to demonstrate if and how it is a disincentive to investment.**